INDIAN CORRIDOR SDN BHD & ANOR A

v.

GOLDEN PLUS HOLDINGS BHD

COURT OF APPEAL, PUTRAJAYA B
GOPAL SRI RAM JCA
ABDULL HAMID EMBONG JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: B-02-103-2008]
14 MAY 2008 C

CIVIL PROCEDURE: *Appeal - Jurisdiction to entertain - Whether appeal should be heard where issue in question has become academic - Principles in Sun Life Assurance Company of Canada v. Jervis [1944] - Appellate court should decline to hear an appeal where a decision would make no difference to litigants - Whether there is a live issue which would affect legal position of parties* D

COMPANY LAW: *Meetings - Calling of meetings - Requisition for meeting by shareholders under s. 145 Companies Act 1965 - Whether shareholders have agreed in Articles of Association not to resort to their right under s. 145 - Whether shareholders can exercise their rights under s. 145 - Whether any conflict between ss. 145 and 153 Companies Act 1965 - Distinction between a notice calling for a meeting and a special notice of a particular type of resolution - Whether a special notice of a resolution is a notice of meeting - Whether bad faith in fixing of venue of meeting* E F

COMPANY LAW: *Directors - Removal - Whether notice requirement in s. 128 Companies Act 1965 sufficiently meets element of fairness - Whether sufficient to make director aware of proposal to remove him - Whether s. 128 requires to set out grounds for proposing removal - Whether s. 128 requires requisitionists to furnish explanatory statements along with a resolution moving for removal of director* G

Both the appellants were shareholders of the respondent (a public listed company) holding 19.745% of the shares therin. On 27 December 2007, acting under s. 145 of the Companies Act 1965 ("the Act") they issued a requisitionists' notice to the respondent. The purpose of the meeting was to remove the directors of the respondent and to appoint others in their place. The meeting was to be held on 26 January 2008 at a venue in Penang. However, H I

A on 16 January 2008, the respondent took out an originating summons seeking declaratory relief which in essence impugned the validity of the requisition on a number of grounds. The High Court found for the respondent and granted the declarations sought. The present appeal was directed against that decision. The B issues raised in the appeal were, *inter alia*, as follows: (a) that on a true construction of article 55 of the respondent's articles of association, the appellants had contracted out of s. 145 of the Act and therefore the appellants were barred from requisitioning a meeting under C s. 145; (b) that s. 145 cannot be invoked by the appellants because of the notice provision housed in s. 153 of the Act; (c) that pursuant to s. 128(2) and (3), it was necessary for the notice of the intended resolution to set out the grounds on which the directors' removal was being sought and failure to do so rendered D the notice void; (d) that the notice in question was bad because it was not accompanied by an explanatory statement as required by s. 128 of the Act and article 59 of the respondent's articles of association; and (e) that the appellants acted in bad faith in fixing Pulau Pinang as the venue of the meeting because the registered E office of the respondent company was in Kuala Lumpur and there was no reason why the meeting could not be held in Kuala Lumpur as in the past. Respondent's counsel further took objection on the grounds that the appeal was academic since the date of the meeting in question had passed. It was contended F that a court will not adjudicate upon an appeal which has become academic.

Held (allowing the appeal with costs)

Per Gopal Sri Ram JCA delivering the judgment of the G court:

(1) In relation to the issue whether the appeal had become academic, the test to be applied in deciding the point is that laid down by Viscount Simon in his speech in *Sun Life Assurance Company of Canada v. Jervis*. A court of appeal H should decline to hear an appeal where there is no issue before it in the sense that a decision on the matter would make no difference to the litigants to the dispute. (para 3)

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(2) The High Court had held that the appellants had by reason of article 55 of the respondent's articles of association contracted out of s. 145 of the Act and were therefore not entitled to rely on that section to requisition a meeting. If the High Court was right, the appellants were forever barred from requisitioning a meeting under s. 145 of the Act. The parties were therefore entitled to know for the future whether that was truly the case. This was a live issue because a decision on it would have made a difference to the parties to the appeal by affecting their respective legal position. It was not a mere academic exercise. (para 4)

(3) Article 55 did not expressly mandate shareholders to have resort solely to s. 144 if they intended to requisition a meeting. The article provided that the directors had a discretion to convene an extraordinary general meeting of the company. If the directors made default in convening such a meeting when requisitioned, then the requisitionists may convene a meeting as provided by s. 144 of the Act. Nowhere did it say that the shareholders shall not resort to their right under s. 145 of the Act. The learned judge erred in the construction she placed on article 55. (para 9)

(4) There is no latent or patent or indeed any other type of conflict between ss. 145 and 153 of the Act. The learned judge failed to appreciate the distinction between a notice calling for a meeting and a special notice of a particular type of resolution. A special notice of a resolution is not a notice of meeting. (para 19)

(5) The notice requirement in s. 128 sufficiently meets the element of fairness as it makes the director concerned aware of the fact that there is a proposal to remove him. The setting out of the grounds for proposing the removal is not a requirement of s. 128. The notice here sufficiently met the requirements of s. 128. (para 21)

(6) Nowhere in s. 128 does the Act require requisitionists to furnish explanatory statements along with a resolution moving for the removal of a director. Article 59 dealt with the notice of meeting and not a special notice given under s. 128. It followed that article 59 was not relevant. (paras 23 & 24)

(7) There was no merit in the argument that the appellants acted in bad faith in fixing Pulau Pinang as the venue of the meeting. Section 145A of the Act and article 56 of the respondent's articles provided the answer to the respondent's argument here. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Kedua-dua perayu adalah pemegang-pemegang saham responden (sebuah syarikat tersenarai) dengan memegang 19.745% sahamnya. Pada 27 Disember 2007, bertindak di bawah s. 145 Akta Syarikat 1965 ("Akta"), perayu-perayu mengeluarkan notis rekuisisi ke atas responden. Tujuan mesyuarat adalah untuk menyingkir pengarah-pengarah responden dan menggantikannya dengan pengarah-pengarah baru. Mesyuarat diadakan pada 26 Januari 2008 di satu tempat di Pulau Pinang. Bagaimanapun, pada 16 Januari 2008, responden memfail saman pemula memohon relif-relif deklaratori yang secara intinya bertujuan mencabar kesahan rekuisisi atas beberapa alasan. Mahkamah Tinggi memutuskan dengan berpihak kepada resonden sekaligus membenarkan deklarasi yang dipohon. Rayuan di sini adalah terhadap keputusan tersebut. Isu-isu yang dibangkitkan di rayuan, antara lain, adalah seperti berikut: (a) bahawa atas pentafsiran sebenar artikel 55 artikel persatuan responden, perayu-perayu telah berkontrak keluar dari s. 145 Akta dan dengan itu dihalang dari merekuisisi mesyuarat di bawah s. 145; (b) bahawa s. 145 tidak boleh digunapakai oleh perayu-perayu kerana peruntukan notis yang ada di dalam s. 153 Akta; (c) bahawa berdasarkan s. 128(2) dan (3), adalah perlu bagi notis resolusi tersebut membentangkan alasan-alasan bagi penyingkiran pengarah-pengarah dan kegagalan berbuat demikian menyebabkan notis menjadi batal; (d) bahawa notis berkenaan tidak sah kerana tidak disertai oleh penyata penjelasan seperti yang dituntut s. 128 Akta dan artikel 59 artikel persatuan responden; dan (e) bahawa perayu-perayu bertindak tidak jujur bilamana menetapkan Pulau Pinang sebagai tempat mesyuarat kerana pejabat berdaftar syarikat responden adalah di Kuala Lumpur dan tiada alasan mengapa mesyuarat tidak boleh diadakan di Kuala Lumpur seperti selalunya. Peguam responden juga membangkitkan bantahan bahawa rayuan sudah menjadi akademik disebabkan tarikh mesyuarat telah pun berlalu. Dihujahkan bahawa mahkamah tidak harus mengadili rayuan yang sudah pun menjadi akademik.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Berhubung isu sama ada rayuan telah menjadi akademik, ujian yang perlu dipakai bagi memutuskan isu ini adalah seperti yang dibentangkan Viscount Simon di dalam *Sun Life Assurance Company of Canada v. Jervis* [1944] AC 111, 113. Sebuah mahkamah rayuan harus enggan mendengar rayuan di mana tiada isu wujud di hadapannya dalam ertikata keputusan ke atas halperkara tidak memberi apa-apa erti kepada litigan yang bertikai.

(2) Mahkamah Tinggi telah memutuskan bahawa perayu-perayu telah, mengambilkira artikel 55 artikel persatuan responden, berkontrak keluar dari s. 145 Akta dan dengan itu tidak boleh bergantung kepada seksyen tersebut untuk merekuisikan mesyuarat. Jika Mahkamah Tinggi betul, bermakna perayu-perayu akan terhalang untuk merekuisisi mesyuarat di bawah s. 145 Akta sampai bila-bila. Pihak-pihak dengan itu berhak mengetahui apa yang menunggu mereka di masa hadapan, jika keadaannya benar-benar begitu. Ini adalah suatu isu hidup kerana apa-apa keputusan terhadapnya akan memberi makna kepada pihak-pihak kepada rayuan dan boleh menjejaskan hak-hak mereka di sisi undang-undang. Maka ia bukan suatu tindakan akademik.

(3) Artikel 55 tidak dengan jelasnya memberi mandat kepada pemegang-pemegang saham untuk hanya menggunakan s. 144 jika ingin merekuisikan mesyuarat. Artikel tersebut memperuntukkan bahawa pengarah-pengarah mempunyai budibicara untuk mengadakan mesyuarat agong luarbiasa syarikat. Jika pengarah-pengarah membuat kesilapan dalam memulakan mesyuarat tersebut apabila direkuisisi, pihak merekuisisi masih boleh mengadakan mesyuarat menurut s. 144 Akta. Tiada apa-apa di sini yang menyatakan bahawa pemegang-pemegang saham tidak boleh menggunakan hak mereka di bawah s. 145 Akta. Yang arif hakim jelas khilaf dalam mentafsir art. 55.

(4) Tidak ada perselisihan, sama ada yang bersifat latent atau patent atau yang berbentuk apa sekalipun, di antara ss. 145 dan 153 Akta. Yang arif hakim gagal melihat perbezaan di antara notis untuk memanggil mesyuarat dan notis khas suatu resolusi tertentu. Suatu notis khas suatu resolusi tertentu bukan notis mesyuarat.

(5) Syarat notis di dalam s. 128 telah memenuhi tuntutan-tuntutan keadilan dengan secukupnya mengambilkira ia mempastikan pengarah yang berkenaan sedar tentang cadangan untuk menyingkirkannya. Pembentangan alasan-alasan bagi cadangan penyingkiran bukan satu keperluan s. 128. Notis di sini telah memenuhi syarat-syarat s. 128.

(6) Tiada apapun di dalam s. 128 Akta yang mengkehendaki perekuisisi membentangkan penyata penjelasan bersama-sama dengan resolusi untuk menyingkir pengarah. Artikel 59 adalah berkaitan dengan notis mesyuarat dan bukannya notis khas yang dikeluarkan di bawah s. 128. Ianya mengikut bahawa art. 59 adalah tidak relevan.

(7) Dakwaan bahawa perayu-perayu bertindak secara tidak jujur apabila menetapkan Pulau Pinang sebagai tempat mesyuarat adalah tidak bermerit. Jawapan kepada hujah responden ini terserlah di dalam s. 145A Akta dan art. 56 artikel persatuan responden.

Case(s) referred to:

Bancorp Investments Ltd v. Primac Holdings Ltd [1984] 9 ACLR 263 ***(dist)***

Cepatwawasan Group Bhd v. Datuk Lo Fui Ming & Ors; Ho Hee Chung (Intervening Respondent) [2004] 4 CLJ 453 CA ***(refd)***

HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd [1957] 1 QB 159 ***(refd)***

In re Dorman Long & Co Ltd [1934] 1 Ch 635 ***(dist)***

Kanda v. Government of Malaya [1962] MLJ 169 ***(dist)***

LC O'Neil Enterprise Pty Ltd v. Toxic Treatments Ltd [1986] 10 ACLR 337 ***(refd)***

Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***

Normandy v. Ind Coope & Co Ltd [1908] 1 Ch 84 ***(dist)***

S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***

Sun Life Assurance Company of Canada v. Jervis [1944] AC 111 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 128(2), 144, 145A, 153
Federal Constitution, art. 135(2)
Securities Industry (Central Depositories) Act 1991, s. 34(5)

Companies Act 1929 [UK], s. 153
Companies Code [Aust], s. 242(1)
Companies (Queensland) Code, s, 248

For the appellants - Gideon Tan; M/s Gideon Tan Razali Zaini
For the respondent - Dato' Dr Cyrus Das (Alvin Tang & D Paramalingam with him); M/s Krish Maniam & Co

[Appeal from High Court, Shah Alam; Originating Summons No: MT1-24-70-2008]

Reported by Amutha Suppayah

JUDGMENT

Gopal Sri Ram JCA:

[1] The facts relevant to this appeal are not in dispute. And they are as follows. There are two appellants before us. Both are shareholders of the respondent (a public listed company) holding 19.745%. On 27 December 2007, acting under s. 145 of the Companies Act 1965 ("the Act") they issued a requisitionists' notice to the respondent. The purpose of the meeting was to remove the directors of the respondent and to appoint others in their place. The meeting was to be held on 26 January 2008. It was to be held at a venue in Penang. However, on 16 January 2008, the respondent took out an originating summons seeking declaratory relief which in essence impugned the validity of the requisition on a number of grounds. An application to restrain the meeting was also made within the summons but was not pursued as both sides agreed to have the summons taken on its merits. At the conclusion of arguments on 25 January 2008, the High Court at Shah Alam found for the respondent and granted the declarations sought. The present appeal is directed against that decision.

[2] When the appeal was called on for hearing, counsel for the respondent took objection to it proceeding as it was academic. After hearing argument, we overruled the preliminary objection and directed the appeal to proceed. The reasons for our decision are as follows.

[3] According to the respondent company, the date of the meeting which was the subject matter of the summons in the court below had passed. There was therefore no live issue before us. It would have been different if the appellant had not agreed to have the summons disposed off on its merits and had instead insisted on the respondent pursuing its application for an interlocutory injunction. In the circumstances, the appellants must now go back and issue a fresh requisition for a meeting as the earlier requisition is no longer extant. A number of authorities were cited in support of the proposition that a court will not adjudicate upon an appeal which had become academic. We do not think that any useful purpose will be served by a discussion of these. Suffice to say that the test to be applied in deciding the point is that laid down by Viscount Simon in his speech in *Sun Life Assurance Company of Canada v. Jervis* [1944] AC 111, 113. To paraphrase in less elegant language what was there said, a court of appeal should decline to hear an appeal where there is no issue before it in the sense that a decision on the matter would make no difference to the litigants to the dispute, that is to say, it would not affect the legal rights of either party to the appeal. Sun Life has been applied by our courts on a number of occasions, and most recently by the Federal Court in *Metramac Corp Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177.

[4] In the present instance, the High Court held, *inter alia*, that the appellants had by reason of art. 55 of the respondent's articles of association (to which we will refer at length later in this judgment) contracted out of s. 145 of the Act and were therefore not entitled to rely on that section to requisition a meeting. If the High Court is right, the appellants are forever barred from requisitioning a meeting under s. 145 of the Act. The parties before us are therefore entitled to know for the future whether that is truly the case. This in our judgment is a live issue because a decision on it will make a difference to the parties to this appeal by affecting their respective legal position. It is not a mere academic exercise. With that we now turn to the merits of the appeal.

[5] The first issue to be determined in this appeal is whether the appellants are barred from requisitioning a meeting under s. 145 of the Act. That section provides as follows:

145 (1) Two or more members holding not less than one-tenth of the issued share capital or, if the company has not a share capital, not less than five per centum in number of the members of the company or such lesser number as is provided by the articles may call a meeting of the company.

(2) A meeting of a company or of a class of members, other than a meeting for the passing of a special resolution, shall be called by notice in writing of not less than fourteen days or such longer period as is provided in the articles.

(3) A meeting shall, notwithstanding that it is called by notice shorter than is required by subsection (2) be deemed to be duly called if it is so agreed:

(a) in the case of a meeting called as the annual general meeting, by all the members entitled to attend and vote thereat; or

(b) in the case of any other meeting, by a majority in number of the members having a right to attend and vote thereat, being a majority which together holds not less than ninety-five per centum in nominal value of the shares giving a right to attend and vote or, in the case of a company not having a share capital, together represents not less than ninety-five per centum of the total voting rights at that meeting of all the members.

(4) So far as the articles do not make other provision in that behalf notice of every meeting shall be served on every member having a right to attend and vote thereat in the manner in which notices are required to be served by Table A.

(5) The accidental omission to give notice of a meeting to, or the non-receipt of notice of a meeting by, any member shall not invalidate proceedings at a meeting.

[6] For completeness we set out below s. 144 of the Act which featured a great deal in the argument of counsel for the respondent before us:

144 (1) The directors of a company, notwithstanding anything in its articles, shall on the requisition of members holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital as at the date of the deposit carries the right of voting at general meetings or, in the case of a company not having a share capital, of members representing not less than one-tenth of the total voting rights of all members having at that

A date a right to vote at general meetings, forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the company of the requisition.

B (2) The requisition shall state the objects of the meeting and shall be signed by the requisitionists and deposited at the registered office of the company, and may consist of several documents in like form each signed by one or more requisitionists.

C (3) If the directors do not within twenty-one days after the date of the deposit of the requisition proceed to convene a meeting the requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves, in the same manner as nearly as possible as that in which meetings are to be convened by directors convene a meeting, but any meeting so convened shall not be held after the expiration of three months D from that date.

(4) Any reasonable expenses incurred by the requisitionists by reason of the failure of the directors to convene a meeting shall be paid to the requisitionists by the company, and any sum so paid shall be retained by the company out of any sums due or to E become due from the company by way of fees or other remuneration in respect of their services to such of the directors as were in default.

(5) A meeting at which a special resolution is to be proposed F shall be deemed not to be duly convened by the directors if they do not give such notice thereof as is required by this Act in the case of special resolutions.

[7] The respondent argued both in the court below and before us that on a true construction of art. 55 of the respondent's G articles of association, the appellants had contracted out of s. 145 of the Act. The judge agreed with that argument. This is what she said:

1. Article 55 of Memorandum of Association provides that H requisitioning shareholders convening their own meeting must act as provided by sec 144 of the Companies Act. It does not have the exclusionary clause like in s. 144 and s. 144 stands on its own and shall prevail. This Article is binding on the defendants as existing shareholders. Therefore, the defendants are not entitled to convene the meeting under s. 145.

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2. Section 153 states that the special notice is given by the shareholders to the company, the meeting is to be convened by the company. This could only be achieved by reading s. 153 with s. 144 and not with s. 145.

3. Under s. 144, the company convene the meeting whereas under s. 145 the shareholders themselves give notice of the meeting. In such event, s. 153 is infringed because the resolution by special notice is to be sent by the company to its members. In this case neither the company nor the directors receive such notice. It is not exhibited at all for proof of service.

4. Section 145(1) allows the shareholder "may call a meeting of the company and such meeting only confine to meeting of a company or of a class of members, other than a meeting for the passing of a special resolution which in this case it is not so.

5. Section 144(3) gives the requisitionists rights to convene a meeting if the directors failed to convene a meeting within 21 days after the date of the deposit of the requisition and such meeting so convened shall be held after the expiration of 3 months from that date. This section may be viewed as a remedy of self help in the event that the directors fail to discharge their duty of convening the meeting. The defendants should exercise their rights under this provision but chose not to do so.

[8] Now, art. 55 reads as follows:

55. The Directors may, whenever they think fit, convene an Extraordinary General Meeting, and Extraordinary General Meetings shall also be convened on such requisition, or, in default, may be convened by such requisitionist, as provided by Section 144 of the Act. If at any time there are not within Malaysia sufficient Directors capable of acting to form a quorum at a meeting of Directors, any Director or any two Members may convene an Extraordinary General Meeting in the same manner as nearly as possible as that in which Meetings may be convened by the Directors.

[9] It is clear from a plain reading of the article that it does not expressly mandate shareholders to have resort solely to s. 144 if they intend to requisition a meeting. What the article says is this. The directors have a discretion to convene an Extraordinary General Meeting of the company. However, the directors must convene an Extraordinary General Meeting where one is requisitioned by shareholders. If the directors make default in convening such a meeting when requisitioned, then the

requisitionists may convene a meeting as provided by s. 144 of the Act. Nowhere does it say that the shareholders shall not resort to their right under s. 145 of the Act. Accordingly, we are of the view that the learned judge erred in the construction she placed on art. 55.

[10] In supporting the judgment of the learned judge on this part of the case, learned counsel for the respondent referred us to the decision of the New South Wales Court of Appeal in *LC O'Neil Enterprise Pty Ltd v. Toxic Treatments Ltd* [1986] 10 ACLR 337. In that case, two shareholders of a company holding not less than 5% of its issued share capital issued a notice convening a meeting under s. 242(1) of the Australian Companies Code which reads:

> 242. (1) So far as the articles do not make other provision, 2 or more members holding not less than 5% of the issued share capital, or if the company does not have a share capital, not less than 5% in number of the members of the company, may convene a meeting of the company.

Article 56 of the company's articles in that case provided as follows:

> 56. The directors may whenever they think fit convene a general meeting and general meetings shall also be convened on such requisition or by such requisitionists as provided by s. 241 of the Code (the equivalent of our section 144). If at any time there are not within the State sufficient directors capable or *(sic)* acting to form a quorum, any director or any one member of the company may convene a general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

[11] The issue before the court was whether the articles did "make other provision" within the meaning of those words with which s. 242(1) opens. At first instance, McLelland J held that it did. He therefore held against the shareholders. The shareholders appealed. The Court of Appeal of New South Wales dismissed the appeal by a majority. Hope JA (with whom Priestley JA agreed) held that art. 56 was "other provision" within s. 242(1). And this is the way in which he put it:

It is submitted for the defendants that, relevantly, art. 56 does no more than note the existence or effect of s. 241, a provision which would apply in any event. However, I have no doubt that, notwithstanding the features of s. 241 to which I have referred, if art 56 made provision for the requisitioning of a meeting of the company in exactly the same terms as provided in s. 241, the articles would contain an 'other provision' within the meaning of s. 242. Such an article would make a provision for the requisitioning of a general meeting by members of the company, and it would be an 'other provision' *even if it might not be inconsistent with s. 242*, in the sense that, although confusion might result, effect could be given to both. In my opinion, the words in art 56 'and general meetings shall also be convened on such requisition or by such requisitionists as provided by s. 241 of the Code' are in a sense a shorthand way of achieving this result, although the language allows for the possibility (as has occurred) that s. 241 might be amended. Article 56 is not simply a provision containing a reminder to members of the ways in which the Code provides for the calling of meetings. It does not, for example, refer to the calling of a meeting by the court pursuant to s. 246 of the Act. It is a specification of when and by whom meetings of the company (other than the annual general meeting) can be called.

Having regard to the language of the article and to the context in which it appears, which is a part of the articles headed 'General meetings', art 56 does in my opinion make other provision for the calling of a meeting of the company *on the 'narrower' construction of the section, that is, it makes other provision for the calling of a meeting upon the requisition of the members of the company*. I would add that I see nothing in the policy or the purposes of the Act which would lead me to a different conclusion. (emphasis added.)

[12] Two things are obvious from those parts of the passage to which we have lent emphasis. First, that the majority took the view that a provision in the articles though not inconsistent with s. 242 would nevertheless be "other provision" as required by that section. Second, that art. 56 was the "other provision" contemplated by s. 242(1). We would add for good measure that Kirby P (a judge whose views upon any subject is entitled to great respect) delivered a most persuasive dissent in which he held, *inter alia*, (i) that it is not correct that "the mere fact that the articles make provision for the convening of a meeting of the company, whatever that provision might be, operates to exclude the benefits

which s. 242 was designed to assure to members"; (ii) that s. 242 was "a 'fail safe' protection for members ... a legislative facility of self help by members, not reliant upon the initiatives of the directors"; and (iii) that "If the articles cannot be categorized as dealing with the requisition by members, they do not operate to exclude the provisions of s. 242, with the useful protections which that section provides."

[13] We have carefully considered *LC O'Neil Enterprise Pty Ltd v. Toxic Treatments Ltd* but do not perceive it to be of any assistance to the instant respondents. It is clearly distinguishable. In the first place, the Australian s. 242(1) that came up for interpretation there is constructed in materially different language from s. 145(1) of the Act. Whilst the former permits a contracting out of its provisions the latter has no equivalent. Put simply, the words "So far as the articles do not make other provision" with which the Australian s. 242(1) opens are absent in s. 145(1). Counsel for the respondent attempted to rely on subsection (4) to show that s. 145 was also subject to the articles of a company. To recall, that subsection says:

> So far as the articles do not make other provision in that behalf notice of every meeting shall be served on every member having a right to attend and vote thereat in the manner in which notices are required to be served by Table A.

[14] This is merely what lawyers call a service provision. It merely governs the mode of serving notices of meetings convened under s. 145. And all it means is this. Notice of every meeting convened under s. 145 must be given to every member who is entitled to attend and vote. The mode in which such notice must be served shall be that provided by Table A. But the articles of association may prescribe a different mode of service. This is not the same as saying that the articles may preclude shareholders altogether from invoking the provisions of s. 145.

[15] With that we turn to the second reason given by the learned judge for holding against the appellants. To remind ourselves, this is what she said:

> Section 153 states that the special notice is given by the shareholders to the company, the meeting is to be convened by the company. This could only be achieved by reading s. 153 with s. 144 and not with s. 145.

> Under s. 144, the company convene the meeting whereas under s. 145 the shareholders themselves give notice of the meeting. In such event, s. 153 is infringed because the resolution by special notice is to be sent by the company to its members. In this case neither the company nor the directors receive such notice. It is not exhibited at all for proof of service.

[16] It may be seen that the judge held that s. 145 cannot be invoked by the appellants because of the notice provision housed in s. 153 of the Act. The latter is compatible with s. 144 but not with s. 145. The respondent supports this finding. If the learned judge is correct, then it would mean that the shareholders of a public company can never have resort to s. 145 of the Act if they want to remove one or more of the directors. Resort may only be had only to s. 144. We must say at once that if so drastic a result was intended by the legislature it would be found in the Act. But we must confess our inability to find such a limitation upon the right conferred by s. 145. The judgment on this part of the case therefore suffers from a logical fallacy of *petitio principii*. With respect, we are therefore unable to agree with her.

[17] In any event, it is our judgment that the learned judge did not appreciate the relevant legislative provisions. In the first place there is s. 153 which provides as follows:

> Where by this Act special notice is required of a resolution, the resolution shall not be effective unless notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved, and the company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice thereof, in any manner allowed by the articles, not less than fourteen days before the meeting, but if after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date twenty-eight days or less after the notice has been given, the notice, although not given to the company within the time required by this section, shall be deemed to be properly given.

[18] Next, there is s. 128 of the Act. It is relevant here because the resolution formulated by the appellants sought to remove the existing directors of the respondent and to replace them with others. Being directors of a public company, special notice of the resolution was required. That is because of the terms of section 128 of the Act which reads:

128(1) A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed.

(2) Notwithstanding anything to the contrary in the memorandum or articles of the company, special notice shall be required of any resolution to remove a director or to appoint some person in place of a director so removed at the meeting at which he is removed, and on receipt of notice of an intended resolution to remove a director the company shall forthwith send a copy thereof to the director concerned, and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

(3) Where notice is given pursuant to subsection (2) and the director concerned makes with respect thereto representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so:

(a) in any notice of the resolution given to members of the company state the fact of the representations having been made; and

(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company),

and if a copy of the representations is not so sent because they were received too late or because of the company's default the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting.

(4) Notwithstanding subsections (1) to (3), copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Court is satisfied that the rights conferred by this section are being abused to secure needless publicity for defamatory matter and the Court may order the company's costs on an application to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

(5) A vacancy created by the removal of a director if not filled at the meeting at which he is removed, may be filled as a casual vacancy.

(6) A person appointed director in place of a person removed shall be treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become a director on the day on which the person in whose place he is appointed was last appointed a director.

(7) Nothing in subsections (1) to (6) shall be taken as depriving a person removed thereunder of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director or as derogating from any power to remove a director which may exist apart from this section.

(8) A director of a public company shall not be removed by, or be required to vacate his office by reason of, any resolution, request or notice of the directors or any of them notwithstanding anything in the articles or any agreement.

[19] In our judgment ss. 128(2) and 153 are to be read as follows. If a public company by resolution in general meeting wants to remove one or more of its directors, then special notice of that resolution must be given to the company. And special notice means notice of not less than 28 days. On having been given special notice, the burden is on the company, that is to say the board of directors having conduct of the management of the company's business and affairs – or to borrow the words of Denning LJ in *HL Bolton (Engineering) Co Ltd v. TJ Graham & Sons Ltd* [1957] 1 QB 159 "the directing mind and will of the company" – to give notice of the meeting to the shareholders. If the company acting through its board of directors fails to do so, surely it cannot rely on its own omission to frustrate the requisitioning members from exercising the very valuable right conferred upon them by s. 145 of the Act. It would amount to a party taking advantage of its own wrong and that is something the law does not countenance. To sum up, there is no latent or patent or indeed any other type of conflict between ss. 145 and 153 of the Act. We may add that the learned judge appears to have failed to appreciate the distinction between a notice calling for a meeting and a special notice of a particular type of resolution. A special notice of a resolution is not a notice of

meeting. It is because the learned judge failed to keep this distinction in mind that she fell into error when construing ss. 145 and 153.

[20] That brings us to the third ground on which the judge found for the respondent. It has to do with s. 128(2) and (3). The point made by the respondent and accepted by the judge is this. Because s. 128(2) says – to quote it –"the director... shall be entitled to be heard on the resolution at the meeting", it was necessary for the notice of the intended resolution to set out the grounds on which the directors' removal was being sought. Failure to do so rendered the notice void. It was further submitted that if the right to make representations was to be a meaningful right, such grounds as aforesaid must be given. Reliance was placed on *Kanda v. Government of Malaya* [1962] MLJ 169 and on the following well known passage in the Advice of the Privy Council delivered by Lord Denning:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

[21] With respect we are of the view that Kanda has no relevance to the present instance. In that case, the court was concerned with the interpretation of art. 135(2) of the Federal Constitution which guarantees to every member of the public service security of tenure in that he or she shall not be dismissed or reduced in rank "without being given a reasonable opportunity of being heard". It is when interpreting that most significant phrase that Lord Denning made his above quoted Delphic pronouncement. Section 128 is differently constructed. It confers no security of tenure upon directors of a public company. It merely entitles such a director to "be heard on the resolution at the meeting". A director is also entitled to make "representations in writing to the company (not exceeding a reasonable length)". He or she may also and request that the company notify its members of the representations. If for any reason the company does not send out the representations to its members the director may require his or her representations to be read out at the meeting. In addition, he or she may also orally address the meeting. In our judgment the pronouncement in Kanda applies in the domain of public law. It

does not apply in the private law sphere, particularly to a resolution that seeks the removal of a director of a company in general meeting. To hold otherwise would be to equate s. 128 of the Act with art. 135(2) of the Federal Constitution and the proceedings of a company in general meeting to a hearing before a tribunal trying a member of the public service charged with a disciplinary offence. All that a resolution contemplated by s. 128 of the Act need do is to set out the proposal to remove one or directors of the company. The notice requirement in s. 128 sufficiently meets the element of fairness as it makes the director concerned aware of the fact that there is a proposal to remove him or her. It is then up to the director concerned to prepare representations setting out the reasons why he or she should not be removed, eg, because he or she has always acted in the best interests of the company. He or she may then attend the general meeting and make an oral address answering his or her critics, if any. This, then, is the content of the rules of natural justice in the context and circumstances encapsulated in s. 128 of the Act. The setting out of the grounds for proposing the removal is not a requirement of s. 128. As observed by Abdoolcader J in *S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors.* [1982] CLJ 65; [1982] CLJ (Rep) 314:

> The rules of natural justice vary in content and ambit according to the circumstances and context (*Pahang South Union Omnibus Co Berhad v. The Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199; *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356) …

[22] Based on the foregoing, it is our judgment that the notice in the present instance sufficiently meets the requirements of s. 128.

[23] The fourth ground advanced by the respondent in support of the learned judge's decision is that the notice in question is bad because it is not accompanied by an explanatory statement as required by s. 128 of the Act and art. 59 of the respondent's articles of association. Learned counsel for the respondent referred us to *Bancorp Investments Ltd v Primac Holdings Ltd* [1984] 9 ACLR 263, *In re Dorman Long & Co Ltd* [1934] 1 Ch 635 and *Normandy v. Ind Coope & Co Ltd* [1908] 1 Ch 84 in support of his submission. Before we enter upon a discussion of these authorities we must observe at once that nowhere in s. 128 does the Act

require requisitionists to furnish explanatory statements along with a resolution moving for the removal of a director. That leaves us with art. 59 which – so far as is relevant to the present case – reads as follows:

> Every notice of meeting shall specify the place, the day and the hour of meeting, and in the case of special business shall also specify the general nature of such business and shall be accompanied by a statement regarding the effect of any proposed resolution in respect of such special business. The notice convening an annual general meeting shall specify the meeting as such, and the notice convening a meeting to pass a special resolution shall specify the intention to propose the resolution as a special resolution …

[24] It is to be noted that the article deals with the notice of meeting and not a special notice given under s. 128. It follows, in our judgment, that art. 59 has no relevance to the facts of the present instance and is of no assistance to the respondent.

[25] The cases relied on by the respondent are clearly distinguishable. *In re Dorman Long & Co Ltd* concerned a proposal of a compromise or scheme of arrangement proposed by the directors and requiring the sanction of the court under section 153 of the UK Companies Act 1929. The proposal had to be put to a meeting of members and creditors respectively. The directors had sent out an explanatory circular to the stockholders. A question arose as to the sufficiency of the information in that circular. It was in that context that Maugham J uttered the following words upon which the respondent relies:

> I now turn to consider, with regard to Dormans, the question whether the resolutions have been duly passed. I observe by way of preliminary that huge sums are involved. Large sums are often involved in the schemes of arrangement which come before this Court for confirmation, and the Court has found it necessary to protect shareholders and creditors alike in connection with such schemes. It may be observed that when the Joint Stock Companies Arrangement Act 1870, was passed, in the majority of cases all the persons concerned with an arrangement could go to the meeting, listen to what was said and vote for or against the arrangement according to the views which they were persuaded to take. In these days, in many of the cases that come before me, only a fraction of the persons who are concerned can get into

> the room where the meeting is proposed to be held, and in the great majority of cases the proxies given to the directors before the meeting begins have in effect settled the question of the voting once for all. It is perhaps not unfair to say that in nearly every big case not more than five per cent. of the interests involved are present in person at the meeting. It is for that reason that the Court takes the view that it is essential to see that **the explanatory circulars sent out by the board** of the company are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote. I am assuming, of course, that, following the usual procedure, explanatory circulars are sent out, because, I may observe, there is nothing in the Act to render them essential. In a sense, in all these cases, **the dice are loaded in favour of the views of the directors:** the notices and circulars are sent out at the cost of the company, the board have had plenty of time to prepare the circulars, all the facts of the case are known to them … (emphasis added)

[26] You can see at once that the passage is self-explanatory. The views there expressed have no relevance whatsoever to the facts of the present instance.

[27] In *Normandy v. Ind Coope & Co Ltd* [1908] 1 Ch 84, the board wanted the company's articles altered. A special resolution was proposed but insufficient information was given by the directors about the proposed alterations. This led Kekewich J to say as follows:

> I recognize also the disadvantage, and I think it is a serious disadvantage, of attempting to put every shareholder in possession of the new regulations without more. I see no reason, if it can conveniently be done, why copies of the regulations should not be sent with the notice shewing what the alterations are. No doubt that would involve a good deal of time and trouble and expense, but I see no difficulty about it. I do see very great difficulty in merely sending copies of the regulations and leaving shareholders, uninstructed, to pick their way through and find out in what respect the new regulations differ from the old. It is a matter for consideration in every particular case.

[28] The case is again distinguishable because it was the burden of the directors to keep the company's shareholders properly advised of the extent to which the articles were to be amended. The present case concerns the statutory right of shareholders to

requisition a general meeting of a company for the purpose of moving a resolution to remove directors. *Normandy v. Ind Coope & Co Ltd* is therefore readily distinguishable on its facts.

[29] In *Bancorp Investments Ltd v. Primac Holdings Ltd*, the directors of a public company with about 22,000 shareholders, issued a notice of meeting the purpose of which was to advise the shareholders of a proposal to alter the company's articles of association by special resolution at its annual general meeting. The notice of meeting was accompanied by a memorandum from the chairman which discussed the proposed alterations. However, the text of the proposed new articles was not provided. A shareholder challenged the validity of the notice of meeting on the ground that it did not fulfil the requirements of art. 45 of the defendant company's articles of association and s. 248 of the Companies (Queensland) Code. It was held by McPherson J that the notice of meeting was invalid. He said:

> The general principle is clear, that a notice, and particularly one that invites the shareholders to alter existing rights and provisions of the articles of association, should be couched in clear terms and that any comments that are given in the form of a circular or memorandum from the board of directors should fully and fairly inform and instruct the shareholders upon what is proposed to be done. The expression 'fully and fairly inform and instruct' is one that is taken from the well known judgment of Long Innes J in *Bulfin v. Bebarfald's Ltd* [1938] 38 SR (NSW) 424 at 433 and has been applied in many cases on subsequent occasions.

[30] It is noteworthy that a common thread runs through *Bancorp Investments Ltd v. Primac Holdings Ltd, In re Dorman Long & Co Ltd and Normandy v Ind Coope & Co Ltd.* They are all cases where directors of a company were proposing a course of action that would have an effect on the rights and interests of the shareholders. None of them concern shareholders requisitioning a meeting under s. 145 of the Act. Indeed, the respondent has been unable to refer to us any authority that imposes such a burden on requisitioning shareholders who invoke s. 145 to call a meeting.

[31] We now come to the last ground on which the respondent supported the trial judge's judgment. The point sought to be made is that the appellants acted in bad faith in fixing Pulau Pinang as the venue of the meeting. This is because the registered office of the respondent company is in Kuala Lumpur and there is no reason why the meeting could not be held in Kuala Lumpur as in the past despite the amendment to s. 145A. In our judgment

there is absolutely no merit whatsoever in this point. Indeed, s. 145A of the Act and art. 56 of the respondent's articles provide a complete answer to the respondent's argument. The former reads:

> A company shall hold all meetings of its members within Malaysia and may hold a meeting of its members within Malaysia at more than one venue using any technology that allows all members a reasonable opportunity to participate.

And the latter states:

> The time and place of any Meeting shall be determined by the conveners of the Meeting.

[32] No further comment or elaboration is called for.

[33] For the reasons already given the appeal was allowed and the orders made by the High Court were set aside. The costs of the appeal and those incurred in the court below were awarded to the appellant. The deposit in court was ordered to be refunded to the appellant. Acting on the decision of this court in *Cepatwawasan Group Bhd v. Lo Fui Ming & Ors* [2004] 4 CLJ 453, we made the following consequential orders:

(i) the appellants reconvene an extraordinary general meeting giving no less than 14 days from the date of the order made herein at a place and time to be decided by the appellants;

(ii) the notice of meeting of the reconvened extraordinary general meeting be given to the shareholders by way of advertisement in two national daily newspapers;

(iii) the proxy forms submitted by the members for the Extraordinary General Meeting on 26 January 2008 shall be recognised at the reconvened Extraordinary General Meeting unless the shareholders of the respondent company lodge fresh proxy forms for the reconvened Extraordinary General Meeting not less than 48 hours before the reconvened Extraordinary General Meeting;

(iv) pursuant to s. 34(5) of the Securities Industry (Central Depositories) Act 1991, the respondent is hereby ordered to provide the record of depositors/shareholders of the respondent not less than three market days before the

reconvened extraordinary general meeting, such record to be handed to the appellants' solicitors 48 hours before the reconvened extraordinary general meeting;

(v) a corporate representative of the appellants as quasi-officials of the reconvened Extraordinary General Meeting shall chair the said meeting; and

(vi) the chairman of the reconvened Extraordinary General Meeting shall put the resolutions contained in the notice of meeting to the members, conduct a vote of the members by poll and announce the results.